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No. 92-978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PERRY BELLAMY,

Petitioner,

—v.—

WILLIAM COGDELL, Warden,
Brooklyn House of Detention,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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February 5, 1993

QUESTIONS PRESENTED

1. Whether a criminal defense attorney should be deemed *per se* ineffective, without regard to his actual performance, by virtue of an unrelated disciplinary proceeding that was pending at the time of defendant's trial, and the attorney's effort to adjourn that proceeding on grounds of illness.

2. Whether any rule finding *per se* ineffectiveness on these facts would constitute a new rule barred by *Teague v. Lane*, 489 U.S. 288 (1989) in a *habeas corpus* proceeding.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent William Cogdell, the Warden of the Brooklyn House of Detention, asks this Court to deny the petition for a writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the Second Circuit, affirming (*in banc*) the judgment of the United States District Court for the Eastern District of New York which denied defendant's petition for a writ of *habeas corpus* in this case. That petition challenged defendant's conviction in the Supreme Court of the State of New York, Queens County, for the crimes of murder in the second degree and criminal possession of a weapon in the second degree. The conviction was sustained on a motion to

vacate judgment, and affirmed by the New York Supreme Court, Appellate Division, Second Judicial Department.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (*in banc*) is reported at 974 F.2d 302, and is reproduced in petitioner's appendix at 1a-27a. The opinion of the United States District Court for the Eastern District of New York (Raggi, J.) is reported at 802 F.Supp. 760, and is reproduced in petitioner's appendix at 53a-97a. The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, affirming the conviction is reported at 160 A.D.2d 886, 554 N.Y.S.2d 320. The opinion of the Supreme Court of the State of New York denying post-conviction relief is not reported, but is reproduced in respondent's appendix, at pp.1a-20a, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit (*in banc*) was entered on September 8, 1992. The petition was docketed in this Court on December 7, 1992, which is within the statutory time. This Court's jurisdiction is properly invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

U.S. Const. Amend. XIV, § 1

. . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Defendant Perry Bellamy was convicted after a jury trial of murder in the second degree (N.Y. Penal Law § 125.25[1]) and criminal possession of a weapon in the second degree (N.Y. Penal Law § 265.03) for his participation in the October 10, 1985 contract killing of New York State Parole Officer Brian Rooney.

The evidence against Bellamy at trial established that the contract killing was on the orders of Lorenzo "Fat Cat" Nichols, one of the most notorious drug dealers in Queens. Nichols had been incarcerated for violating his state parole, largely as a result of the efforts of Officer Rooney.

The evidence consisted primarily of three inculpatory statements defendant had made to law enforcement authorities after the murder, including one recorded on videotape, and another statement made by defendant to a fellow prisoner while awaiting trial. In those statements, defendant admitted that he was present when the plan to murder Officer Rooney was designed, and that he had lured Rooney to the prearranged location of the killing where, in defendant's presence, associates of Nichols repeatedly fired at Rooney until he was dead. Defendant admitted receiving $5000 from Nichols for his role in the murder. He was sentenced to a term of imprisonment of fifteen years to life for the murder, and a concurrent prison term of five to fifteen years for the weapons offense.

After the trial, defendant filed a motion for state post-conviction relief, raising for the first time the claim of ineffective assistance of trial counsel that underlies this petition. That claim was based on facts relating to a disciplinary proceeding against defendant's trial counsel that was pending at the time of the murder trial, and that later resulted in the attorney's suspension from the practice of law. The claim was the subject of a full and fair hearing before the judge who had tried the case. At that hearing, the following facts were established.

In January of 1986, defendant's mother retained Sidney Guran to represent defendant in his murder case. Guran had been a member of the New York bar for almost forty years. He was semi-retired and living in Florida, but had represented defendant in the past and agreed to represent him again. In October of 1986, Guran was charged with professional misconduct in connection with allegations that he had converted client funds to his own use in 1976, and had mishandled a real estate transaction in 1977. On November 10, 1986, Guran's attorney requested an adjournment of the disciplinary proceeding, on the ground that Guran had a variety of ailments which prevented him from preparing for a hearing on these charges. In connection with this request, he submitted a letter from Guran's physician listing the ailments and stating that they led "at times" to an "inability to concentrate" and would require three to six months of treatment, during which time the attorney would be "effectively incapacitated" (letter quoted in Court of Appeals opinion, petitioner's appendix at 5a).

In light of this submission, the Disciplinary Committee did not grant the adjournment, and instead, reciting Guran's claim of physical disability, petitioned the New York Supreme Court, Appellate Division, First Department, on November 21, 1986, to suspend Guran indefinitely from the practice of law. Guran responded on December 12, 1986, by stating that a suspension would be unnecessary because he was essentially retired. He requested permission to continue representing defendant in his murder trial because of defendant's special trust in him, stating that "I, of course, will not attempt to try this case by myself. I will have a competent attorney, but I must be present to assist him." (Response quoted in Court of Appeals opinion, petitioner's appendix at 5a.) The disciplinary matter remained pending at the time of defendant's trial.

On December 11, 1986, Guran advised the trial judge of the pending disciplinary matter and of his health problems. He said he was now feeling better, and had secured the assistance of another lawyer. The judge called the Appellate Division, First

Department, and obtained an assurance that it was appropriate to permit Guran to try the case.

On January 6, 1987, Guran visited his doctor, who found no physical problem that would impair his ability to practice law, and no mental problem whatever. That same day jury selection began in defendant's case. The lawyer who had planned to assist Guran was occupied with another case, and Guran tried the case alone. The jury returned a verdict of guilty on January 24, 1987.

On March 26, 1987, the Appellate Division, First Department, suspended Guran from the further practice of law. No hearing was ever held in this disciplinary proceeding. Instead, the First Department acted entirely on the basis of Guran's pretrial representation, made in support of his request for an adjournment, that he was not then capable of preparing for the disciplinary proceedings. The First Department concluded that this representation "implicitly concedes that he is, at this time, incapable of practicing law." (Order quoted in District Court opinion, petitioner's appendix at 68a.)

On May 5, 1987, defendant filed a motion to vacate judgment, claiming that his lawyer should be deemed *per se* ineffective in light of his post-trial suspension from the practice of law. At the hearing on that motion, Guran's doctor explained the meaning of the letter he had written in support of Guran's request for an adjournment of the disciplinary proceeding. He testified that he had never found any impairment of Guran's mental capacities, and that his opinion that Guran was "virtually incapacitated" related mainly to his opinion that Guran had poor balance, and therefore should not travel frequently between his home in Florida and New York, as the doctor believed would be required for the disciplinary hearing. (District Court opinion, petitioner's appendix at 70a; state hearing court opinion, respondent's appendix at 5a -7a)

On the basis of the evidence at the hearing, and on the basis of the court's observations of Guran's excellent performance at

trial, the state trial court concluded that defendant had received effective assistance of counsel and denied the motion. Leave to appeal that ruling was denied by the Appellate Division, Second Department. Subsequently the conviction was affirmed by the Appellate Division, and leave to appeal that decision was denied by the New York Court of Appeals.

On December 11, 1990, defendant filed the petition for federal *habeas corpus* that is at issue here. He claimed that his trial attorney should be regarded as *per se* ineffective, on the basis of the facts relating to the disciplinary proceeding against him. He also argued that his attorney had failed to perform in a professionally reasonable manner and that but for his errors the outcome of the trial might have been different. The United States District Court for the Eastern District of New York (Raggi, J.) reviewed the state court record in great detail, and denied relief in a careful opinion discussing the evidence and the applicable law. The District Court concluded that the rule of *per se* ineffectiveness did not apply in this case, because defendant's lawyer was neither (1) unauthorized to practice law at the time of the trial, as in *Solina v. United States*, 709 F.2d 160, 167 (2d Cir. 1983) and *United States v. Novak*, 903 F.2d 883 (2d Cir. 1990), nor (2) affected by a conflict of interest arising out of criminal conduct by the attorney akin to that for which his client was being tried, as in *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984). The District Court found that the representations made by Guran and his doctor to the disciplinary authorities did not warrant a finding of *per se* ineffectiveness, because the doctor's testimony at the state post-conviction hearing showed that those statements were somewhat overstated, because the doctor's testimony also showed that any pretrial disability had improved by the time of trial, and because the trial record showed that Guran provided a vigorous and competent defense.

A panel of the Court of Appeals would have reversed that decision. In the petition for rehearing, respondent argued not only that the panel decision was erroneous, but also that it

would have created a novel and unprecedented rule, prohibited in a *habeas corpus* proceeding by *Teague v. Lane*, 489 U.S. 288 (1989). The Court of Appeals *in banc* affirmed the judgment of the District Court, finding no basis for a determination that counsel was *per se* ineffective, and thus avoiding the need to reach the *Teague* issue.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF EVERY CIRCUIT THAT HAS CONSIDERED THE ISSUE OF *PER SE* INEFFECTIVENESS OF COUNSEL.

No court of appeals has ever held that a lawyer's suspension or disbarment from practice renders him *per se* ineffective with respect to matters handled by the lawyer prior to the suspension or disbarment. Defendant argues that certiorari should be granted to resolve a conflict in the circuits, but the conflict he sets forth is not genuine, nor does the alleged conflict have any application to the facts of this case.

Defendant asserts that there is a conflict of authority between the Second Circuit and the Ninth Circuit which should be resolved by this Court in this case. According to defendant, however, it is the Second Circuit rule which is more favorable to his claim, and the Second Circuit has denied him relief in this case. Thus it is hard to see how this case presents an appropriate vehicle for resolving any conflict, if one exists.

Defendant correctly points out that in *United States v. Novak*, 903 F.2d 883 (2d Cir. 1990), the Second Circuit invalidated a 1982 conviction as a result of the defense attorney's 1988 disbarment (petition for certiorari at 17). In that case, however, the disbarment was based on a finding that the lawyer had procured his original admission to the bar by fraud, and thus his license to practice law was void *ab initio*. His disbarment in 1988 was not the termination of a previously valid license, but

rather a determination that he had never had a valid license. Thus *Novak* does not stand for the proposition that retroactive effect should be given to an attorney's suspension or disbarment for misconduct or disability, such as the suspension that occurred after defendant's trial in this case.

Defendant tries to avoid the problem of retroactivity in this case with two arguments, but neither is adequate to the task. First, he notes that the eventual suspension of Guran was "for a condition that existed while he represented defendant" (petition for certiorari at 23). But of course every suspension or disbarment relates to prior misconduct or evidence of disability, and thus this analysis would require making all suspensions and disbarments retroactive, at least to the date of the underlying conduct. No court has taken that approach.

Second, defendant argues that Guran would have been suspended prior to trial but for his statement that he would obtain assistance at the trial, and therefore Guran should be treated as if he had been suspended prior to trial (petition for certiorari at 24). Both courts below, however, have rejected this factual claim, and thus it cannot form the predicate for any legal analysis in this Court.

There is thus no conflict of authority among the circuits with respect to the effect on a conviction of the trial attorney's subsequent suspension or disbarment for misconduct or disability. No court of appeals has ever found *per se* ineffectiveness in these circumstances.

It is not clear that the circuits are divided even with respect to the prospective effects of suspension or disbarment. Defendant argues that the Ninth Circuit has no rule of *per se* ineffectiveness at all, whereas the Second Circuit recognizes *per se* ineffectiveness in certain limited circumstances (petition for certiorari at 13-14.) To the contrary, the decisions of the Ninth and Second Circuits are in fact entirely consistent. *United States v. Mouzin*, 785 F.2d 682 (9th Cir. 1986), cited by defendant for the Ninth Circuit's refusal to recognize a *per se* rule in

any circumstance, actually rejected such a rule only in the particular circumstances of that case, where during the course of the trial the attorney was disbarred by the Ninth Circuit Court of Appeals, though not by the District Court, for unrelated misconduct. The Second Circuit might well have ruled likewise. *See, e.g., Waterhouse v. Rodriguez*, 848 F.2d 375 (2d Cir. 1988) (no *per se* ineffectiveness when attorney disbarred on day of hearing, and disbarment not entered or communicated to attorney until after hearing). On the other hand, the Ninth Circuit in *Mouzin* cited with approval the leading Second Circuit cases discussing the two established grounds for *per se* ineffectiveness, namely *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983) (never-admitted lawyer), and *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984) (conflict of interest from attorney's involvement in defendant's alleged crimes). *See Mouzin*, 785 F.2d at 697, 699. Thus, it is doubtful that the Ninth Circuit has rejected the *per se* rule that is applied in the Second Circuit.

Moreover, both the Second Circuit and the Ninth Circuit recognize an important distinction between suspension and disbarment, on the one hand, and the failure ever to obtain a valid license on the other. In the case of suspension or disbarment, the courts have been reluctant to find *per se* ineffectiveness, because a suspended or disbarred lawyer was at one time certified as competent to practice law, in contrast to a never-admitted lawyer, who has never passed that initial screening. *See, e.g., United States v. Novak*, 903 F.2d at 886-90; *Waterhouse v. Rodriguez*, 848 F.2d at 382-83; *United States v. Mouzin*, 785 F.2d at 696-98; *United States v. Hoffman*, 733 F.2d 596, 599-603 (9th Cir. 1989); *Solina v. United States*, 709 F.2d at 166-69.

Defendant's argument at bottom is not that there is a split in the circuits but that there would be a split, if the Second Circuit had properly applied its own precedents in this case (*see* petition for certiorari at 24, arguing that the Second Circuit majority followed the rule of the Ninth Circuit).

He has pointed to no court of appeals decision that supports his claim for relief, nor can he do so. There is no division of authority that warrants granting the petition for certiorari in this case.

II. THE SECOND CIRCUIT'S REJECTION OF DEFENDANT'S CLAIM HAS NO SIGNIFICANCE BEYOND THE FACTS OF THIS CASE; BY CONTRAST, AN ORDER GRANTING RELIEF WOULD ESTABLISH A NEW RULE, BARRED ON *HABEAS CORPUS* BY *TEAGUE v. LANE*, 489 U.S. 288 (1989).

A. The majority and the dissent below divided on questions of fact that do not warrant this Court's review.

While the Second Circuit *in banc* was narrowly divided in this case, the issues that divided the majority and the dissent were entirely factual.

The dissenters concluded that Guran would have been suspended prior to defendant's trial but for his representation that he would obtain assistance with the trial, a representation which in the end he did not honor (petitioner's appendix at 25a and 26a). The majority, however, found no support for that factual claim (petitioner's appendix at 13a), which had also been rejected by the District Court (petitioner's appendix at 83a).

The dissenters doubted that Guran made any serious effort to obtain such assistance (petitioner's appendix at 24a, 26a). The majority, however, found that he had obtained a firm commitment from another lawyer, who was unexpectedly unavailable on the trial date (petitioner's appendix at 13a-14a).

The dissenters apparently credited Guran's statement that he was medically incapacitated when he sought an adjournment of the state disciplinary proceeding (Court of Appeals opinion, petitioner's appendix at 25a). The majority, however, found that the claim of medical disability may well have been exaggerated, and in any event Guran had no incapacity at the time

of trial (Court of Appeals opinion, petitioner's appendix at 15a-16a). The majority's finding on this point agreed with that of the District Court (petitioner's appendix at 84a-85a), and the state hearing court (respondent's appendix at 15a-16a).

In resolving these factual matters the majority, unlike the dissent, followed this Court's instructions to defer on factual matters to the findings of the District Court, *see* Fed. R. Civ. P. 52(a) (lower federal court "findings of fact shall not be set aside unless clearly erroneous"); *Amadeo v. Zant*, 486 U.S. 214, 223 (1988), and the state court, *see, e.g., Marshall v. Lonberger*, 459 U.S. 422 (1983); *Sumner v. Mata*, 455 U.S. 591, 598 (1982). For that reason alone, the majority's determinations should not be disturbed. Moreover, the controversy between the majority and the dissent about the facts of this particular case does not warrant this Court's review. The dissenters made an impassioned argument on this ground against *in banc* review by the Court of Appeals (petitioner's appendix at 19a-20a), and that argument counsels even more strongly against invoking the jurisdiction of this Court.

B. An order granting relief to defendant would violate the rule of *Teague v. Lane* prohibiting the creation of new rules on federal *habeas corpus* review of state convictions.

Another reason for denying the petition for certiorari is that the rule of law under which defendant seeks relief would constitute a new rule of law that cannot be created in a *habeas corpus* proceeding under *Teague v. Lane*, 489 U.S. 288 (1989).

No court has ever before held that an attorney is *per se* ineffective by virtue of a disciplinary proceeding pending at the time of the trial in question. Nor has any court held that an attorney is *per se* ineffective by virtue of an allegation that the attorney was in poor health during his representation of the defendant, without regard to an evaluation of the attorney's actual performance. Moreover, the principles set forth by this

Court and applied by the lower federal courts do not even remotely foreshadow such a holding.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that ordinarily a defendant who claims ineffective assistance of counsel must show particular acts or omissions outside the range of professionally competent assistance, and prejudice to the defendant in the sense of a reasonable probability that those errors affected the outcome. 466 U.S. at 690-94. *Strickland* noted that a *per se* rule is appropriate when counsel is denied altogether, or when there is an actual conflict of interest, 466 U.S. at 692, and the courts of appeals have followed *Strickland* in finding a *per se* deprivation of effective counsel only in those two limited circumstances. *See, e.g., United States v. Novak*, 903 F.2d 883 (2d Cir. 1990) (representation by nonlawyer); *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984) (actual conflict). Moreover, where the claim of ineffective assistance is based on a conflict of interest, the defendant must still show how the conflict impaired the attorney's performance, even though he need not show that the impairment likely affected the outcome of the trial. *See Strickland*, 466 U.S. at 692, citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980); *Cancilla*, 725 F.2d at 869-71; *United States v. Jones*, 900 F.2d 512, 518-19 (2d Cir. 1990).

Defendant argued below that this case was controlled by both the *per se* rule for representation by a nonlawyer, and the *per se* rule for representation by a lawyer with an actual conflict, but the courts below correctly rejected both branches of his claim.

He argued that Guran was the equivalent of a nonlawyer, like the person in *Novak* who obtained his admission to the bar by fraud, because Guran had allegedly delayed his suspension and thus retained his license by fraud. The courts below rejected that claim both as a matter of fact and as a matter of law. They also rejected the factual premise, finding that the record does not support the claim that his representations caused a delay in

his suspension. They rejected the legal argument, noting that the suspension of a lawfully admitted attorney is not the equivalent of a determination that an attorney was never lawfully admitted in the first place. Thus, the *per se* rule that defendant seeks to invoke is not supported by precedent, and would consitute a new rule barred by *Teague*.

Defendant's alternative argument is even less tenable. He argued below that Guran had a conflict of interest as a result of his illness, like the lawyer in *Cancilla* who was implicated in his client's crimes. The courts below rejected that claim, too, as a matter of both fact and law. They rejected as a factual matter the claim that the disciplinary proceedings established that Guran was disabled by illness from providing competent representation to defendant, noting that the claims of illness made in the disciplinary proceeding may have been exaggerated, or the illness may have abated. They rejected as a legal matter the claim that an attorney's alleged illness can render him *per se* ineffective, without any inquiry into the effect of that illness on the attorney's performance. Indeed, if the *Cancilla* rule were somehow applicable, it would nevertheless require a determination that the conflict, or the illness, impaired the actual performance of the attorney, a determination not made in this case and not supported by the record. Thus, the rule sought by defendant cannot constitute a straightforward application of the *per se* rule for attorneys with an actual conflict, and would instead constitute a new rule barred by *Teague*.

Nor can the new rule sought by defendant qualify as sufficiently fundamental to avoid the prohibition of *Teague*. The right to effective assistance of counsel involves fundamental fairness and accuracy, of course, but the difference between enforcing that right by the *Strickland* test and enforcing it by a new *per se* rule does not make the kind of contribution to fairness and accuracy that warrants retroactive application. *Cf. Linares v. Senkowski*, 964 F.2d 1295 (2d Cir.), *cert. denied*, 113 S.Ct. 494 (1992) (federal courts cannot impose on *habeas* review a new rule requiring prosecutor to be admitted attorney,

because rule would make only marginal contribution to accuracy); *United States v. Salerno*, 964 F.2d 172 (2d Cir. 1992) (*Grady* not retroactive because makes only marginal contribution to accuracy).

Finally, the barrier to defendant's claim created by *Teague* should not be ignored in this case merely because the state first raised the *Teague* issue in the petition for rehearing or rehearing *in banc* in the Court of Appeals. While nonretroactivity under *Teague* can in a proper case be waived, *Collins v. Youngblood*, 497 U.S. ___, ___, 110 S.Ct. 2715, 2718 (1990), failure to raise the claim does not compel a finding of waiver. *See Teague v. Lane*, 489 U.S. at 300 (reaching issue *sua sponte*); *Saffle v. Parks*, 494 U.S. 484, 496 n.1 (1990) (Brennan, J., dissenting); *cf. Granberry v. Greer*, 481 U.S. 129 (1987).

The issue should not be deemed waived here, because the state had a good reason for not raising the issue sooner. Until the panel opinion was issued, this case was litigated not as a controversy over a new rule but rather as a question of whether defendant was entitled to relief under the old *per se* ineffectiveness rule of *Novak* and *Solina*. The state argued that the rule of those cases, which governs persons who act as counsel but are not in fact licensed attorneys, has no application to this case, which involves an admitted attorney who may or may not have been impaired by illness at the time of his client's trial. It has not been customary, though perhaps it should be, to add to every argument against the application of a rule to the facts of a case, the further argument that any attempt to invoke the old rule would so distort it as to constitute a new rule prohibited by *Teague*. The novelty of such an argument constitutes a good reason for failing to make it, just as the novelty of *Teague* itself constituted a good reason for the state's failure to invoke it in *Hopkinson v. Shillinger*, 888 F.2d 1266, 1288 (10th Cir. 1989) (*en banc*). In this case, the state raised the *Teague* issue as soon as it was called for by the panel decision announcing a new rule—in the petition for rehearing and suggestion for rehearing *in banc*.

Thus, *Teague* prohibits this Court from granting defendant the relief that he seeks in this *habeas corpus* proceeding, and provides a compelling reason to deny the petition for certiorari in this case.

III. THE RULE SOUGHT BY DEFENDANT WOULD OPEN THE DOOR TO A WHOLESALE EFFORT BY STATE PRISONERS TO AVOID THE RULE OF *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984).

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that a criminal defendant cannot overturn his conviction for ineffective assistance of counsel unless he can show both that the attorney failed to perform in accordance with reasonable professional standards, and that the attorney's errors likely affected the outcome of the trial. *Strickland* cautioned that "[j]udicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 689. The defendant must identify particular acts or omissions which form the basis of the claim, and must show both that they were unreasonable and that they likely affected the outcome of the proceedings. 466 U.S. at 690-92. A reviewing court should often be able to dispose of an ineffectiveness claim on the ground of lack of prejudice, without reaching the question of unreasonable performance. 466 U.S. at 697. "Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." 466 U.S. at 697.

This carefully crafted set of rules confining claims of ineffective assistance within manageable bounds would become a nullity under the new rule sought by defendant. Under that rule, a defendant could avoid the requirements of *Strickland* by characterizing his claim as an attack on the attorney's mental or physical capacities, rather than an attack on the specifics of the attorney's performance and the fairness of the resulting trial. A claim that the attorney was too ill, mentally or physically, or too distracted by pending disciplinary matters, or too

tired to provide effective assistance, would enable a defendant to avoid the requirement of showing deficiencies in performance and a prejudicial effect on the trial.

The purpose of this *habeas corpus* proceeding is to determine whether defendant received the effective assistance of counsel guaranteed him by the Constitution of the United States. A review of the transcript of this trial shows that he did. Nothing that happened in connection with the attorney's pending disciplinary matter can change that fact. Because the petition for certiorari invites the Court to establish a new *per se* rule of ineffective assistance of counsel, with the potential to undermine *Strickland* and invite a vast number of new claims, this Court should deny the petition.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: Kew Gardens, New York
February 5, 1993

Respectfully submitted,

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APPENDIX

SUPREME COURT—QUEENS COUNTY
CRIMINAL TERM, PART K-7

Index No. 5382/85

By John T. Gallagher, J.

Dated January 31, 1989

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

PERRY BELLAMY,

Defendant.

Defendant moves for an order vacating judgment pursuant to section 440.10 of the Criminal Procedure Law.

The defendant herein, along with two codefendants, was indicted October 31, 1985 and charged with Murder in the Second Degree; Criminal Possession of a Weapon in the Second Degree and Criminal Possession in the Third Degree.

Prior to trial, defendant's case was severed from that of his codefendants and on January 5, 1987 the defendant went to trial before a jury. On January 24, defendant was convicted of Murder in the Second Degree and Criminal Possession of a Weapon.

During the pretrial stage and the trial itself, the defendant was represented by his retained counsel, Sidney Guran, Esq. On March 26, 1987, the Appellate Division suspended the attorney on the grounds that he was presently incapable of practicing law due to medical problems.

The defendant, now represented by Michael A. Ciaffa, Esq., was sentenced on July 30, 1987 to a term of 25 years to life on the murder count and 5 years to 15 on the weapons count. Both sentences are to run concurrently.

Defendant now seeks to vacate his judgment of conviction based on denial of his constitutional right to counsel and deprivation of due process. In particular, four specific grounds are alleged.

1. Defendant's trial attorney was physically and mentally incompetent due to medical disability.

2. The court erred in permitting counsel to try the case alone.

3. The court erred in failing to inquire of defendant if he was aware that his attorney was facing suspension.

4. Defendant was denied effective assistance of counsel at a pretrial suspension [sic] hearing.

A hearing was held on the question of counsel's medical competency. Said hearing took place on January 21, 1988, continued through February 19 and terminated on July 8. Based on this hearing, the trial records, exhibits and affidavits the court now considers defendant's application. Because of the extensive nature of this case, the court will first set forth the factual background pertinent to each point raised by the defendant and then consider the applicable law.

I

BACKGROUND

1. COUNSEL'S MENTAL AND PHYSICAL CONDITION AT TIME OF TRIAL

Defendant's first point is that his trial counsel was not capable due to poor health. In this respect, Dr. Richard P. Cohen, the attorney's personal physician since 1985, wrote a letter on October 29, 1986 addressed "To whom it may concern:" In this letter the doctor stated that his patient suffered from a number of complex medical problems. A copy of this letter was sent to the Honorable Robert W. Sweet in November 1986, in con-

nection with a federal matter involving the defendant. A second copy was also sent to the First Department Disciplinary Committee and based on it a motion was made by that body to the Appellate Division to suspend counsel from the practice of law. The grounds alleged were that counsel was suffering from mental and physical disabilities which made it impossible for him to defend himself in a pending disciplinary proceeding. On March 26, 1987 this application was granted and reference was made to Dr. Cohen's letter.

Based on this letter and his prior treatment of the attorney, Dr. Cohen was called to testify. He discussed in detail the six conditions mentioned in this letter:

1. Atherosclerotic cardiovascular disease;

2. Status post coronary artery bypass graft in 1983 which was complicated by post-operative pneumonia and pleuropericarditis;

3. Residual angina pectoris for which he takes cardiac medications;

4. Severe allergic rhinitis with chronic recurrent asthmatic bronchitis. For this he takes a number of medications which include both systemic and local cortisone;

5. A history of diverticulitis with a previous diverticular abscess and fistula. This problem is inactive at the present time;

6. Polyneuropathy: For the past six weeks, the patient has been undergoing intensive evaluation of a progressive polyneuropathy, characterized by peripheral motor weakness, unsteadiness on his feet and, at times, an inability to concentrate. Comprehensive work-up is being undertaken. The possibilities include a polygammopathy or steriod myopathy; amyotrophic lateral sclerosis appears unlikely based on evaluation so far.

As for the cardiovascular disease, the Doctor explained that his patient suffered a heart attack over a decade ago. This in turn, lead to coronary heart problems which required a coro-

nary artery bypass graft in 1983. While the bypass relieved the patient's symptoms significantly, he was still left with a mild angina condition which required medication. This is basically the history of the first three enumerated medical problems. The fourth medical condition concerns severe allergic rhinitis with recurrent asthmatic bronchitis. Dr. Cohen explained that this condition was caused by chronic allergies manifesting themselves with a stuffed nose, coughs and on occasion bouts of true asthma. The patient has suffered from these allergies for over a decade.

As to the fifth condition of diverticulitis, the Doctor explained that it was a form of hernia in the bowels which is relatively common. Occasionally an infection occurs in one of these hernias and that is termed diverticulitis which leads to fever and abdominal pain. In 1982, the patient was operated on for a fistula in his bowel area and since that time the problems mentioned have not re-occurred.

The final medical problems deal with a condition known as polyneuropathy. This is a general term used to describe a clinical syndrome involving a number of nerves in the peripheral nervous system which appears to be involved with some pathological basis which is alterating the body's ability to function properly. Polyneuropathy is characterized by peripheral motor weakness, unsteadiness on ones feet and, at times, inability to concentrate. Initially, the patient complained of his symptoms in March 1986 and the original diagnosis was a mid-ear problem. However, in September the symptoms occurred and a re-evaluation was undertaken. Thus, the October letter was written during a time of continuing medical examinations and expressed uncertainty as to the patient's present condition.

The Doctor was also questioned on his use of the phrase "inability to concentrate." This was explained that if one was unsteady on one's feet or had fallen, one was obviously not in a position to think clearly or handle his affairs at these times.

Dr. Cohen was asked about the possible illnesses which might be causing these symptoms. In replying, the Doctor pointed out that polygammopathy is a syndrome in which the

proteins of the body involved in the immune system attack nerve cells themselves and affect their ability to function properly. Amyotrophic lateral sclerosis is a disease of the nerves involving that area where the neurons of the nerves meet the spinal cord, a form of non-infectious polio. This disease causes progressive weakness of all muscles and is the most serious of all possible explanations.

The Doctor was next questioned on his patient's use of drugs. The court record indicates that the prescribed medications included Lanoxin, Cardiazem, Prednisone, Proventil, Vanceral, Vancerase and Colace. The Doctor stated that Lanoxin is a heart medication and given to help the heart pump more efficiently. Cardiazem helps control the symptoms of angina pectoris. Prednisone is an oral form of cortizone, effective in treating asthma and allergic rhinitis. Proventil is also used in treating asthma in that it helps dilate the tubes in the lungs. Vanceral and Vancerase similarly dilate the tubes of the lungs and are useful in asmathic situations. Colace is a medicine commonly prescribed for bowel conditions. The Doctor testified that all of these drugs were prescribed in medically accepted forms and quantity.

As regards the letter and his patient's physical condition at the time of trial, Dr. Cohen stated as follows:

"CROSS EXAMINATION BY MR. KELLY:

Q Dr. Cohen, specifically as to that October 1986 letter which was sent to the Bar Association, who had requested that letter?

A Mr. Guran.

Q And at that time was Mr. Guran was—you did not know the extent of it, but he told you he was facing some problems with the Bar Association?

A That is right.

Q And as your attorney stated, he did not want to go to into a great deal of detail?

A I did not think that would be beneficial for him at the time.

Q Now, that time that particular letter, would that basically be in hopes of Mr. Guran—that letter would be in hopes of an adjournment or the postponement?

A That was my understanding.

MR. CIAFFA: Objection.
THE COURT: Overruled.

A That was my understanding in hoping of the postponement of or adjournment.

Q Sir, there came a time later on—specifically you know that Mr. Guran is a lawyer, isn't that right?

A Yes.

Q And he is a trial lawyer?

A Yes.

Q All right. In January 1987, did there come a time, sir, that you saw Mr. Guran?

A In January of '87?

Q '87, last January?

A Let me double check the next date when I saw him, Mr. Kelly. I am sorry. There is an office visit of January 6, 1987.

Q Okay. And at that particular time, sir, did he tell you that he was about to start the trial or was on trial?

A I don't specifically recall that. He was often, when he was in New York, his—he would, so called, kill two birds with one stone by visiting me at the time he was in New York, and for one of his business matters.

Q Now, sir, at that particular time, Mr. Guran, did you restrict him in any way from practicing law, medically speaking?

A Not at all.

MR. CIAFFA: Objection.
THE COURT: Overruled.

Q Now, did you at any time insist, sir, that he have any assistant or any associate when he was practicing law?

A Never.

MR. CIAFFA: Objection.
THE COURT: Overruled.

Q Now, would it be fair to say, sir, that Mr. Guran had a little trouble with his balance, is that correct, his walking around?

A That was his problem.

Q What was the origin of that, the actual walking around, the problems with his walking around and his balance?

A Well, that was the concern we have been discussing. It's a peripheral neuropathy of uncertain eteology.

Q Did that have anything to do with his mental capacities at that time.

A No.

Two attorneys testified during the hearing, Marvin Skedelsky and Victor Knapp. Mr. Skedelsky is presently representing Sidney Guran, but did not represent him prior to April 16, 1987.

Attorney Skedelsky testified that Mr. Guran indicated "that he might require my assistance in trying the Bellamy case, if it was required by the Court or if he felt he was going to need it because of some problems he was having with the Bar Association." The witness also stated that in January 1987, he was available to assist Mr. Guran and that this attorney did not call him a few days later. However, at that time Mr. Skedelsky was unable to assist him since he was now representing another party on trial. On cross-examination Mr. Skedelsky believed that if he had assisted him at that time, Mr. Guran himself would have been the lead trial lawyer.

Victor Knapp next testified. He stated that he was assisting co-counsel for defendant Howard Mason, who had been indicted with defendant Bellamy. This witness stated that he had conversations outside the courtroom with Guran on several occasions. During one of these talks, Guran asked how much the witness might charge to assist him during the Bellamy trial as a trial counsel. Mr. Knapp pointed out that since he was already helping one codefendant, he would not be in a position to help Mr. Guran.

On another occasion Mr. Guran asked Mr. Knapp's advice regarding suppression minutes. A third conversation concerned a discussion dealing with parole regulations. Mr. Knapp, when asked about attorney Guran's physical appearance, replied "Well, I mean it was kind of obvious. Sometimes he had problems getting around. He had a condition."

Annie Bellamy, the defendant's mother, also testified. She stated that her son had selected his own trial lawyer although she had frequent conversations with Guran. She was present in the courtroom for the majority of the trial. As regards Mr. Guran's appearance, she stated that he seemed tired during most of the course of the trial. Mrs. Bellamy was not aware that Mr. Guran was suspended as an attorney until the spring of 1987. Nor did she complain at any time during the trial about his work to the Court, other attorneys or court personnel.

While on the issue of health, defendant's affidavit states the following.

"At the trial itself, I knew right from the start that something was wrong with Mr. Guran. He was pale and looked ill. He frequently coughed and had little energy."

2, 3. WERE DEFENDANT'S RIGHTS VIOLATED WHEN THE COURT ALLOWED COUNSEL TO TRY HIS CASE ALONE OR WITHOUT NOTIFYING THE DEFENDANT AS TO THE PENDING SUSPENSION?

The trial attorney was retained by the defendant early in 1986 and represented him in all the pretrial stages, as well as during the trial. On October 20, 1986 the Departmental Disciplinary Committee to the First Judicial Department filed charges of professional misconduct against Guran. These charges arose, for the most part, out of a disputed probate matter in 1975 and involved the failure to file a final estate accounting. All of the charges dealt with civil and not criminal matters.

On November 10, 1986 the Departmental Disciplinary Committee received a letter from Guran's attorney, Richard Baltimore, Esq., stating that his client "Is not mentally capable of preparing for (a) hearing." Baltimore then requested an adjournment based on the attorney's medical condition. The Disciplinary Committee moved on November 21, 1986, in the Appellate Division, First Department, for an order suspending Guran from the practice of law. Said order was to take effect immediately and to extend for an indefinite period upon the grounds that respondent is suffering from physical and mental disabilities.

Guran responded to this petition by stating that there was no necessity for suspension since he has not taken any new work since 1984. He did point out that he has presently one case—The People v. Perry Bellamy—in which he was retained in January 1986. In regards to this case the attorney stated in his affidavit.

"The case has recently been severed from that of a co-defendant and is to be tried in Part 6, Queens Supreme Court, on [January] 5, without further adjournment.

Mr. Bellamy has been in jail since October, 1985, in protective custody. I represented Bellamy several times in the past and he trusts me and so does his mother. When he was first

arrested his mother called me and when I told her of my retirement, and the fee I would need to come out of retirement she agreed to try 18b counsel. Mr. Bellamy and his attorney did not get along and they switched to another attorney whom Bellamy did not trust. Mrs. Bellamy then made an agreement with me and has almost paid the full fee we agreed upon which I can no longer return because I no longer have it."

There are numerous written exhibits and a video tape confession (the motion to suppress has been had and denied already). There are seven or eight prosecution witnesses and four or five defense witnesses and motion to compel disclosure of some of those witnesses names has been made and is pending. A new lawyer would need two or three months to prepare, and the trial Judge is not willing to put the case over for that period of time.

I, of course, will not attempt to try this case by myself. I will have a competent attorney, but I must be present to assist him. Bellamy relies on, and strictly trusts only me and his mother has paid me. It would be a complete disservice to this defendant and jeopardize his right to a fair trial if I were not permitted to assist in his trial and defense."

By letter dated December 11, 1987, Guran notified this court of the pending disciplinary charges, and also of the fact that he might be suffering from A.L.S. He also stated:

"I've told some of this to Gene Kelly,* (the Assistant District Attorney) including the motion to suspend . . . . I have answered the motion, & am opposing it on many grounds including the fact that I have no other case pending anywhere; have closed my office in N.Y. State; no longer intend to practice anywhere; and therefore, argue, the motion is unnecessary. Of course, I'll call you immediately if there's a decision. If it is favorable, I'll be in the courtroom on the scheduled date prepared to proceed. If it's unfavorable, I'll ask for a delay of the suspension long enough to try the case. If that's refused, I'll have Skedelsky prepared to begin on that date, & will ask you for permission to sit at counsel table to help guide my client—

who, as I've said, will not proceed without me, at this time . . . ."

Shortly before trial, counselor personally met with this court to discuss the pending motion to suspend and how it might affect the case. The court then called the First Department, Appellate Division, explained the situation and the pending disciplinary motion and asked if it was appropriate for the trial court to permit counselor to try this case. The Appellate Division responded that it was permissible for the court to allow counselor to try the case.

Based on the above, defendant now contends that once the court learned of the pending Appellate Division motion it was error to try the case alone.

Defendant next contends that since the court was aware that Guran was the subject of a pending disciplinary motion, this fact imposed a duty on the court to make the defendant aware of the situation. It is argued that the trial court's failure to inquire whether defendant was aware of these charges and whether he knowingly and intelligently consented to be represented by counsel under these circumstances, deprived Bellamy of his constitutional rights.

4. COUNSELOR'S CONDUCT AT THE HUNTLEY HEARING

The final point raised by defendant is that he was denied effective representation of counsel by virtue of errors at the suppression hearing held on February 19, 1986.

The hearing minutes establish that defendant made oral, written and video taped statements to law enforcement officials. In particular, he made an oral statement to Sergeant Robert Plansker while at the 115th Precinct, oral and written statements to Detective Bernard Steffen at the Queens District Attorney's office and finally made a video-taped confession to Assistant District Attorney Peter Reese at the Queens Homicide Investigation Office.

Defendant's contends (sic) that Attorney Guran failed to afford effective assistance in that he simply concentrated on the

voluntariness of defendant's statements and neglected to follow two other important lines of questioning. The first area that counsel failed to explore was the fact that the defendant might have been represented by other attorneys in open criminal matters (*People v. Bartolomeo*, 53 NY2d 225). The second alleged error was counselor's failure to investigate and seek suppression of a statement made by a witness named Larry Robinson under the doctrine enunciated in *Maine v. Moulton*, (474 US 159). This doctrine sets forth the principle that a post-indictment statement made to a known codefendant in prison and elicited in the absence of counsel must be suppressed.

In support of the *Bartolomeo* contention defendant argues that the defendant had been arrested for the sale of drugs on September 10, 1985 and arrested on October 2, 1985 on a similar offense. This information was contained in the Criminal Justice System Computer Print-Out listing defendant's prior criminal history and based on this document, it is contended that counsel should have pursued the possibility of defendant being presently represented by one or more attorneys on these charges. Particularly, in view of the fact that both cases appear to be still open.

As regards the Robinson statement, the record indicates that a witness named Larry Robinson allegedly heard the defendant make incriminating statements regarding his role in the crime. Counselor contends that this witness was a known informer and this information should have been utilized at the suppression hearing.

Having set forth the factual background of defendant's contentions, this court will now consider them in their legal context.

II.

THE RELEVANT LAW

The right to effective assistance of counsel is guaranteed by the Federal and State Constitution. However, what constitutes

effective assistance is not and cannot be fixed with precision and varies according to the particular circumstances of each case (see *People v Droz*, 39 NY2d 457). "A convicted defendant, with the benefit of hindsight often can point out where he or she thinks counsel went awry. (*People v Rivera*, 71 NY2d 705, 708.)" But trial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness. So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met." (*People v. Baldi*, 54 NY2d 137, 146-7.)

1. THE ISSUE OF COUNSELOR'S HEALTH

The first contention of defendant is that the attorney was physically and mentally incapable at time of trial. The defendant established that Guran was being treated over a decade for a cardiovascular condition, asthmatic bronchitis and diverticulitis. In addition, counsel was now undergoing tests for a potentially serious nerve disorder, amyotrophic lateral sclerosis. Analyzing these conditions, it is apparent that the heart, bronchial and bowel conditions occurred mainly in the past. Any treatments at present were more to control the symptoms than to treat the illness.

The possibility of nerve disease, of course, was far more serious. The symptoms of occasional dizzyness and muscular weakness started in March 1986 and continued at least to January 1988. Medical treatment during this period was constant and a series of tests were undertaken to determine the nature of counsel's polyneuropathy.

However, the issue before this court is not counsel's medical history nor his past or current symptoms, but rather the state of his health during the period of January 5, 1987 when the jury was selected, to January 24, 1987 when the jury rendered its verdict. Several witnesses testified as to the attorney's health during this time. Dr. Richard P. Cohen stated that the attorney's mental capacities were unaffected during this period, but his

sense of balance was impaired and he had difficulty walking. Two attorneys, representing codefendants, also testified. Mr. Victor Knapp indicated that the trial attorney had problems getting around. The other witness, Mr. Skedelsky, had conversations during this period and possibly a meeting. He could remember that Guran was under stress, but gave no testimony indicating any change in the condition of the attorney's health or mental condition. The client's mother felt that the attorney was "tired during the trial." The defendant himself presumably sat next to his attorney for three weeks and was only able to observe that his lawyer was pale and looked ill. He also noted that Guran coughed and had little energy.

The cases dealing with attorneys who are mentally or physically impaired at trial are few. Clearly "it is elementary that the right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare for the law and the facts relevant to the defense and who is familiar with and able to employ at trial basic principles of criminal law and procedure. (*People v. Sanin*, 84 AD2d 681, 683.) In the *Sanin* case the court ruled that the totality of omissions and commissions on the part of the trial attorney could only be attributed to the fact that counselor had suffered a stroke which left him physically and mentally incapable of preparing the law and applying it at trial.

The second case, not in this jurisdiction, but relevant is *White v State* (414 N.E.2d 973). In that case the Court of Appeals of Indiana, Second District, noted on page 974:

"Counsel is presumed to have prepared and executed his client's defense effectively. This presumption will be disturbed only upon strong and convincing proof that what counsel did or did not do made the proceedings a mockery of justice and shocks the conscience of the reviewing court. In resolving this issue the reviewing court will consider the totality of the circumstances surrounding counsel's pretrial preparation and the actual conduct of the trial. Reversible error will be found if counsel failed to provide the defendant with adequate legal representation."

The facts of the *White* case indicated that trial counsel was 70 years of age and had suffered a recent heart attack requiring postponement of trial. During the course of the one-day trial the attorney was taking five different medications, some several times daily. In addition, counselor was required to lie down in the judge's chambers to rest during trial. Two or three days after the trial the attorney suffered a second heart attack. The Indiana Court ruled that counselor's ill health seriously limited his ability to provide adequate legal representation. Another case in this areas is *People v Cole* (23 AD2d 656.) In this matter the defendant claimed that he was denied effective assistance of counsel due to his attorney's mental and emotional problems and established that his trial counsel had been committed to a mental institution within six months after his trial. Based on these facts, the Appellate Division ordered a hearing.

A similar hearing was granted in *People v Coley* (85 AD2d 929) when the defendant alleged that his trial counsel suffered mental problems, resulting in bizarre behavior not apparent on the transcripts.

Evaluating all of the pertinent evidence in light of the above cases, this court finds that Guran was 72 years of age, an experienced trial lawyer and a respected member of the Bar for over 40 years. During this period preceding trial he was under a doctor's care due to the possibility of being afflicted with A.L.S., a serious nerve disease. He was also under emotional stress due to a pending disciplinary hearing. Physically he suffered from a lack of coordination and weakness.

However, in early January his mental condition had improved to the extent that he felt himself capable of conducting a trial. The trial itself required approximately three weeks of courtroom work. During that time the attorney selected his jury, presented his case, cross-examined witnesses and delivered a detailed summation.

There was no evidence of mental or emotional aberrations in his handling of this case nor was there any signs of physical incapability. It is true that counselor required the use of a cane, but that is far from the physical disability contemplated in the

above cases. As to the fact that he exhibited marks of fatigue and appeared tired, these symptoms could not be considered unusual in a three-week case involving a charge of murder.

As for the letter of Dr. Cohen, this court finds that the purpose of such a document was to secure an adjournment of counsel's pending disciplinary action until Guran could regain his emotional equilibrium. By the time of trial, two months had passed and the attorney obviously felt mentally capable of now trying his client's case. It must also be noted that any further adjournments might have harmed defendant and bringing a new attorney into the picture would have necessitated additional delay.

In addition, it must be noted that counselor requested no adjournments due to his physical condition nor did he exhibit any strange or bizarre traits which might indicate anything out of the ordinary. Finally, the defendant made no mention of his attorney's health or expressed any degree of dissatisfaction with his lawyer's trial conduct. No complaint was made during trial or immediately thereafter.

Based on the above, this court holds that the attorney was mentally and physically capable to try the defendant's case and did so in a competent manner.

2. THE ISSUE OF COUNSEL TRYING THIS CASE ALONE

Defendant's second contention is that Guran's pending disciplinary action created an appearance of inadequate representation sufficient to trigger the trial court's action to the extent that the attorney should have been replaced, or at least assisted, by co-counsel. Failure to take either of these actions, it is alleged, violated the defendant's due process.

In effect, defendant is urging a Caesar's wife argument. Reasoning that an attorney must not only be free from ethical blemish, but that the mere suspicion of same should disqualify or limit his legal activities. Such a doctrine would substitute a trial court's judgment for that of the Appellate Division. It is clearly the duty of the higher tribunal to "censure, suspend

from practice or remove from office any attorney *** admitted to practice who is guilty of professional misconduct ***." (Judiciary Law, § 90, subd 2.) If this court complied with defendant's request and removed the attorney from this case or restricted his action by requiring co-counsel, it would not only be censuring the attorney and implying that he was guilty of some form of unethical conduct on a ten-year-old charge, but even more important, the court would be denying the defendant the right to select counsel of his own choosing, by "an entirely unwarranted interference with the attorney-client relationship." (*People v. Gonzalez*, 30 NY2d 28, 34.)

This being so, this court finds no duty imposed on it to limit the attorney's right to try his case based on the fact that there was a pending disciplinary action. The court did feel obligated to clarify the matter with the Appellate Division and once having performed this act, it felt free to commence the trial. Therefore, there was no violation of defendant's right to due process.

3. THE ISSUE OF NOTICE TO THE DEFENDANT

The third point raised is that the court was duty bound, in any event, to inquire of the defendant as to whether he was aware his attorney was facing suspension grounds of incapacity. In support of this argument defendant starts off by pointing out that a trial judge has a duty to protect the right of an accused to effective assistance of counsel (*People v Mattison*, 67 NY2d 462). He next reasons that if the court must determine, in cases of joint representation, whether a defendant's decision to proceed with his attorney is an informed consent (*People v Macerola*, 47 NY2d 257) then a court is equally obligated to make sure that a defendant is aware of the potential risks involved in those case in which his attorney is facing suspension due to incapacity.

A review of this argument indicates that the defendant is equating the conflict inherent in multiple representation with a possible suspension. The constitutional right to counsel is impaired only if one can show conflicting interests between

defendants (*Glasser v United States*, 315 US 60, 70). A conflict of interest exists only when the individual defenses "run afoul of each other." (*People v Gonzalez*, supra.) The defendant in this case has not established the nature or degree of harm that an attorney involved in a suspension hearing might do to his particular case. Basically, he has not shown any conflicting interest between himself and his attorney. Even if defendant is only arguing from analogy, it must be pointed out that disciplinary proceedings are deemed "private and confidential." (Judiciary Law, § 90, subd. 10.) This would be particularly true in those cases still in the pending stage.

Based on the above, this court finds the defendant has failed to established any legal grounds which require a court to conduct an inquiry of a defendant regarding his attorney's possible suspension. Hence, there is no merit to the argument that notice should have been given in this case.

4. THE ATTORNEY'S REPRESENTATION AT THE SUPPRESSION HEARING

Defendant's final contention is that he was denied effective assistance of counsel at the pretrial suppression hearing on two grounds. The first is that his counsel failed to pursue *Bartolomeo* leads, and the second is that counsel failed to investigate a statement made by a witness, Larry Robinson.

As to the *Bartolomeo* issue, defendant argues that Guran should have sought to establish that the defendant was the subject of custodial interrogation and that the police knew or had reason to know that he was still represented by counsel in an open criminal case. While it was the theory of the People that the defendant was merely a witness and not a suspect at the time of the statement, it is defendant's contention that a police report written by Detective Waddell contained information indicating that a police informant had linked him to the crime. In view of this, his attorney should have followed this lead instead of concentrating solely on the voluntariness of the statement.

The minutes establish that while Guran did raise the issue of whether or not defendant was under arrest, the major thrust of his argument dealt with the fact that he was coerced into making statements by a series of police officers and an assistant district attorney. This strategy was a reasonable one in view of the length of time defendant spent at the station house. It refutes the argument, as counsel now urges, that the attorney "failed to conduct a legally sufficient investigation." (*People v Wilson*, 133 AD2d 179, 181). Even if it would not have harmed the defendant's case to have pursued the informant's statement, the failure to do was not so significant as to violate defendant's constitutional rights.

The second alleged omission concern the defendant's purported statement to a fellow inmate, Larry Robinson. Defendant argues that Guran failed to make a proper investigation regarding this statement. While again it may have been desirable for counsel to have followed this lead, the attorney's failure to do so may have been deliberate and based on sound reasoning. The People argue that Robinson was a civilian who heard an inculpatory statement from the defendant and that Guran knew this. Therefore, there was no evidence that Robinson was working under the direction of law enforcement officials while he heard the statement. This being the case, *Maine v Moulton* would not apply. (See *People v Satterfield*, 66 NY2d 796).

As regards the suppression hearing in general, the record indicates that the attorney recognized the importance of challenging the defendant's own statements and moved forward in a timely fashion. A hearing was held since the facts warranted it (see *People v Wagner*, 104 AD2d 457). The hearing was extensive; five witnesses testified for the People. All were cross-examined by counsel. Under these circumstances, it is apparent that Guran had a purpose in conducting the suppression hearing and pursued it. As was noted in *People v Satterfield* (*supra*, p. 799-800) it is not the duty of a court "to second-guess whether a course chosen by the defendant's counsel was the best trial strategy, or even a good one, so long as

defendant was afforded meaningful representation." Based on the facts, this court concludes that the defendant was not denied effective representation of counsel during the course of his pretrial *Huntley* hearing.

The application to vacate judgment is therefore denied in all respects.

Order entered accordingly.

The clerk of the court is directed to mail a copy of this decision and order to the attorney for the defendant and to the Assistant District Attorney.

JOHN T. GALLAGHER, J.S.C.